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Supreme Court of the United States.

OCTOBER TERM, 1966.

No.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,
v.
DONALD M. PAINTEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Opinions Below.

The opinion of the United States District Court for the District of Massachusetts (App. *infra*, p. 12) is reported at 252 F. Supp. 851; and the opinion of the United States Court of Appeals for the First Circuit (App. *infra*, p. 24), dated November 10, 1966, has not yet been reported.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on November 10, 1966. The jurisdiction of this court is invoked under 28 U.S. Code § 1254 (1).

Questions Presented.

1. Was there an illegal entry into the apartment of the respondent?
2. Was there an illegal search of the apartment of the respondent?
3. Does the respondent have standing to assert suppression of abandoned property as evidence?

Constitutional Provisions and Statutes Involved.

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement of the Case.

The respondent, Painten, filed a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts (R.A. 2-7). The petition was brought pursuant to 28 U.S. Code § 2241 (*a*) and 28 U.S. Code § 2254. Painten sought to set aside a conviction in the State Court for armed robbery and related offenses. His convictions had been affirmed *sub nom. Commonwealth* v. *Binkiewicz*, 342 Mass. 740 (1961). The writ was granted, *Painten* v. *Commonwealth*, 252 F. Supp. 851 (D.C. Mass. 1966), and the Commonwealth appealed. The United States Court of Appeals for the First Circuit affirmed the decision. *Commonwealth* v. *Painten.*

The facts material to the consideration of the questions presented are as follows:

On or about March 1, 1958, Emmett McNamara and Herbert Maxwell, two plainclothes officers of the Boston Police Department, observed the respondent and one George Ash in an automobile in the South End of Boston (R.A. 24). George Ash was known to the officers personally and Painten was identified from a "mug" shot in the pocket of Officer McNamara (R.A. 24-25). Both men were known to have records (R.A. 26, 33). There had been a rash of liquor-store holdups and a loan-company holdup that day (R.A. 24, 26). The officers decided to keep the respondent and George Ash under surveillance (R.A. 24).

The two men stopped in front of a liquor store and the respondent got out of the car and entered the store (R.A. 24). Ash, who was driving the car, saw the officers and took off down the street with a burst of speed. The officers gave chase, using the siren. After several blocks the officers overtook the car (R.A. 25). Ash was ordered out of the car and asked why he had run. His reply was that "McNamara had scared him" (R.A. 25). The officers looked in the car and, after some conversation, let Ash go on his way, in the hope that Ash would lead them to Painten (R.A. 26).

The officers discovered that Painten had an apartment on Dartmouth Street, in Boston's South End (R.A. 26). They went to the apartment building and found the car that Ash had been driving (R.A. 26). A check of the front door of the apartment building disclosed respondent's name under one of the bells (R.A. 26). At this point, Officer McNamara put in a radio call for two more officers (R.A. 27).

When the other officers arrived, McNamara informed them that they were "going up to see some fellows in an

apartment, and asked them to watch the front and rear of the building" (R.A. 27). Officers McNamara and Maxwell then proceeded upstairs and knocked on the respondent's door. Respondent answered the door, opening it only a few inches, and asked: "Who's there?" McNamara showed his badge and replied: "It's the police. We'd like to talk to you." Respondent asked if they would wait a minute. McNamara replied that they would, and respondent closed the door. While the door was closed, McNamara heard what sounded like a window being raised and lowered inside the apartment. A few seconds later, respondent opened the door. McNamara and Maxwell entered the apartment (R.A. 27).

Inside the apartment the officers found George Ash and a woman (R.A. 27). Respondent stated that the apartment was his. There was some conversation between McNamara and the occupants of the apartment. No search of respondent's person or his apartment took place at this time (R.A. 27-28).

About three minutes after McNamara and Maxwell entered the apartment, the officer stationed in the rear came up and said: "They threw a bag out the window" (R.A. 28). The bag had landed on the fire-escape directly under the corner window of respondent's kitchen, the window from which the bag was dropped. The officer went down the fire-escape to the second-floor level and picked up the brown paper bag (R.A. 28). In the kitchen the bag was opened by McNamara and he discovered, wrapped in three sheets of waxed paper, a .32-caliber automatic and a .45-caliber revolver, together with nine .32-caliber bullets and thirteen .45-caliber bullets scattered about the bag (R.A. 28). Respondent stated that he knew nothing about them, but at the evidentiary hearing on his petition for writ of habeas corpus he admitted that the guns belonged to

George Ash (R.A. 19). McNamara then placed the respondent under arrest and proceeded to search the apartment (R.A. 28).

During the search of the apartment the officers seized a box of .32-caliber shells found in the kitchen and about $980 found under the mattress in respondent's bedroom. Later a roll of waxed paper was seized because the torn edge matched the edge of the wax paper in which the guns had been wrapped (R.A. 28, 37-38). Over the weekend FBI Agents made a list of the serial numbers of the money found in the apartment. The serial numbers of some of the bills matched those of bills that had been taken in the robbery of the People's National Bank in Marlboro, Massachusetts (R.A. 37).

The articles seized and the serial numbers of the bills were introduced at respondent's trial for bank robbery.

Argument.

I. The Decision of the Court of Appeals is in Conflict with the Decision of Another Court of Appeals on the Same Matter.

The Court of Appeals has ruled that the police, knowing of a crime and knowing that the respondent and his companion were suspicious characters, set out to arrest and search the men in the hope that evidence would develop. In reaching its decision, however, the court seems to have disregarded completely the actions of the police and relied solely on what the officers had in their minds at the time they entered the apartment of the respondent.

It is reasonable to assume that the police would not have gone to the apartment of the respondent if they did not have some suspicion about his connection with a crime. This is probably true in most instances where a police offi-

cer goes to the home of a person with a reputation similar to that of the respondent.

A similar situation existed in the case of *Chapman* v. *United States*, 346 F. 2d 383 (9th Cir. 1965). In that case the FBI was investigating the theft of certain property from a national bank. When they went to the home of the defendant they only knew that she was a former employee of the bank in the section where the documents were missing and that she had refused to return her key upon request. It was not until they entered the house and saw ashes in the fireplace and other papers on the floor which were from the bank that the defendant was arrested and a search made of the premises. The court ruled that, because of what occurred after the officers reached the home of the defendant, they had probable cause to arrest her. Thus the search that followed was valid.

In the case at bar, events occurred after the officers arrived at the apartment of the petitioner which gave them probable cause to arrest petitioner. The police discovered guns that the respondent had attempted to discard, and the discovery was made without a search. It must be noted that no arrest was made until the discovery of the guns. If, in fact, the officers intended to arrest the respondent, there was ample time to do so before the discovery of the guns.

Despite the distinction drawn between *Robbins* v. *MacKenzie*, 364 F. 2d 45 (1st Cir. 1966), and the case at bar, the Court of Appeals for the First Circuit seems to have decided this case in conflict with its own prior opinions. In *Robbins* the police knew that the defendant had been convicted of a crime similar to the one under investigation. They went to the rooming house where the defendant was staying and stationed one officer at the back door. The other officer was allowed to enter, and, upon entry, asked

the defendant to come to the station for interrogation. The District Court found that this request was not an arrest. It was not until the officer saw the wristwatch on the defendant's arm and a gold coin fall out of the pocket of a companion that they were placed under arrest and a search was made. The court distinguished the cases by saying that in *Robbins* the purpose of the police was to talk, and in the case at bar the purpose was to make a search. While the police may have said before entering the apartment what they were thinking or had in mind doing, they clearly did not do any more than the officers did in *Robbins*. If we are to decide a case based solely on the thinking of the police as opposed to overt acts, then the law of search and seizure is thrown wide open to prevarication and requires the employment of hindsight on the part of the court. It would appear that the court in this decision was telling the police "don't think or your subsequent actions will be invalid."

II. The Court of Appeals has Decided a Federal Question in a Way which Conflicts with Applicable Decisions of the Supreme Court of the United States.

The Supreme Court of the United States has not laid down a "fixed formula" for the application of the Constitutional prohibition against unreasonable searches and seizures. The only requirement or standard set down is one of reasonableness. See *Mapp* v. *Ohio*, 367 U.S. 643 (1961). "The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the

concomitant command that evidence so seized is inadmissible against one who has standing to complain." *Ker* v. *California*, 374 U.S. 23, 34 (1963).

In holding that the police, knowing of a crime and knowing that the petitioner and his companion were suspicious characters, set out to arrest and search the men in the hope that evidence would develop, the Court of Appeals applied a subjective standard. Such a standard has never been set down by the Supreme Court of the United States. In fact, some courts have stated specifically that a subjective standard is not the test. In the case of *United States* v. *Russian*, 192 F. Supp. 183 (D.C. Conn. 1961), the court held that the state of the arresting officers' minds is not the criterion whereby to determine the making of an arrest; the proper standard should be an objective one.

Applying an objective standard, the actions of the respondent and the police clearly indicate that the respondent was not under arrest at the time of entry into the apartment and that said entry was made with the consent of the respondent. The respondent went to the door, saw the officers, and asked them if they would wait a minute. They agreed, and respondent closed the door (R.A. 27). Clearly, if the officers intended to arrest respondent or to make a forcible entry, this was the time to do it. They would certainly realize that, by allowing respondent to close the door, he would be able to escape or dispose of evidence. Still, the officers waited patiently until the door was reopened by respondent (R.A. 27).

The Court of Appeals based its decision on the testimony of Officer McNamara. The pertinent testimony is as follows:

> "Q. Was it your opinion, Mr. McNamara, something was going on in that household to give you reason to enter the household without a warrant?

"A. Yes, sir.

"Q. Can you state to the court what that was?

"A. Well, in that household, it has people with a background, people that I knew were in there, I might be able to solve a string of serious crimes." (R.A. 32.)

"Q. When he returned to the South End, as you might expect, for the company of Painten whom he had left just earlier, what gave you reason to feel that you had the grounds to enter the apartment when you did not have reason to pick them up when they were together in the car?

"A. When I first saw them, and saw Painten going in the liquor store, I felt this might be a liquor store holdup. The situation changed. Shortly after, when Ash panicked and gave us a chase around the South End, and now we have them together in the apartment and the holdup of the loan company is in my mind now, since there is no liquor store holdup, and I find out he is hiding there, these things in my mind lead me to arrest him for that holdup.

"Q. That is the only basis, the reason for arresting him for the finance company holdup?

"A. Because of their records and association and the officer coming in, and discovering the guns." (R.A. 34-35.)

The last answer of Officer McNamara clearly indicates that it was not his intention to arrest respondent until after the discovery of the guns. However, assuming that he did, the record still shows that he did not arrest respondent until probable cause was obtained.

To apply the standard set down by the Court of Appeals would be to hold also that probable cause must exist be-

fore the police go to talk to a suspect, rather than before they arrest him. Clearly, this is not the rule. Probable cause must exist before an arrest without a warrant can be made. See *Henry* v. *United States,* 361 U.S. 98 (1959).

Pursuant to the direction of the Supreme Court of the United States *in Ker* v. *California, supra,* the Commonwealth of Massachusetts has established workable rules regarding searches and seizures, and these rules do not violate the Fourth Amendment of the Constitution of the United States. These rules do not include a subjective standard in determining probable cause for arrest of an accused. In fact, the idea has been rejected. ". . . the Commonwealth should not be conclusively bound or limited by the officer's choice of words made subjectively in the active execution of his duties." *Commonwealth* v. *Lawton,* 348 Mass. 129, 132 (1964).

More recently, the Commonwealth reiterated its position on the arresting officer's state of mind in the case of *Commonwealth* v. *Ballou,* 1966 Mass. Adv. Sh. 835. At page 839 the court states:

> "The captain's testimony that he considered the defendant to be under arrest before coming within five feet of him and before a word was spoken or any physical restraint imposed was an opinion on a matter of law which does not estop the Commonwealth or foreclose the courts. *Commonwealth* v. *Lehan,* 347 Mass. 197, 205, 207. *Commonwealth* v. *Lawton,* 348 Mass. 129, 132-133. The trial judge in effect so ruled, and correctly."

If we apply the objective standard as adopted by the Commonwealth, the entry into the apartment of the respondent was legal and the search, after the arrest, was also valid.

With regard to the guns discovered by the police, the respondent does not have standing to complain of or assert their suppression as evidence, because they were abandoned and discarded by the respondent. See *Abel* v. *United States,* 362 U.S. 217, 240-241 (1960); *Jones* v. *United States,* 362 U.S. 257, 261 (1960); *United States* v. *Walker,* 190 F. 2d 481, 483 (2d Cir. 1951).

Conclusion.

The Commonwealth of Massachusetts has never before sought certiorari in any case involving constitutional rights. However, the effect of the Painten decision shifts the test of illegal searches and seizures from one of overt acts to one of the thoughts of the police; it radically changes the law of search and seizure as exponded by the highest court in the land. If certiorari is to be denied in this case, the Painten decision will become a dangerous and far-reaching precedent for all law enforcement officials across the nation. For these reasons the Commonwealth of Massachusetts respectfully asks that certiorari be granted.

Respectfully submitted,

EDWARD W. BROOKE,
Attorney General,
By WILLIE J. DAVIS,
Assistant Attorney General.

[Appendix follows.]

Appendix.

Opinion of the District Court for the District of Massachusetts.

March 31, 1966

CAFFREY, D.J.

Petitioner Donald M. Painten was tried by a jury in the Superior Court of the Commonwealth of Massachusetts and convicted of conspiracy to steal property, the theft of one automobile, and armed robbery, masked and disguised, of the Peoples National Bank, Marlboro, Massachusetts. He was sentenced to twenty years in the Massachusetts Correctional Institution at Concord on the bank robbery conviction, ten years for the automobile theft, to be served concurrently with the twenty year sentence, and two years on the conspiracy conviction, the two years to take effect from and after the expiration of the other sentences. He is now serving these sentences.

Painten's conviction was affirmed by the Supreme Judicial Court of Massachusetts in an opinion reported at 342 Mass. 740 (1961). Thereafter he filed a petition for a writ of error in the Supreme Judicial Court. The petition was denied after a preliminary hearing. Petitioner subsequently filed the instant writ of habeas corpus in this court.

Petitioner alleges eight separate assignments of error which he feels establish that his imprisonment is illegal and in violation of the Fourteenth Amendment. It appears that all of these contentions have been raised before the state court either on appeal or in petitioner's writ of error.

By agreement of counsel the case was initially submitted to this Court for decision on the basis of a portion of the record from the Middlesex Superior Court. Thereafter, *sua sponte*, the Court ordered the parties to file a complete

state court record. Still later, after a review of an 1161-page transcript of the trial held in Middlesex Superior Court, this Court *sua sponte* ordered an evidentiary-type hearing with reference to two of Painten's contentions, (1) that he had been prejudiced by the admission at the trial of articles seized by the police in the course of an illegal search of his apartment, and (2) that he had been denied equal protection of the law on the basis of his confinement in a prisoner's cage in the Superior Court courtroom. This opinion will first consider those of Painten's contentions which are resolvable on the basis of the state court record and will conclude with consideration of the two contentions as to which evidence was offered in this court.

Painten's first assignment of error is that the trial judge erred in failing to grant his motion for bills of particulars. The Supreme Judicial Court thoroughly considered this point and held that the indictments were in the language of the statute and that they were sufficient, fully, plainly, substantially, and formally, to set out the charges against him. There was no denial of federal rights in this ruling.

Painten also contends that the amendment in the middle of the trial of the indictment charging him with larceny of an automobile denied him his right to know before trial the essential components of the charge against him. The amendment merely changed the name of the automobile owner to Elora G. Trump from that of her husband John C. Trump. This point was also fully considered by the Supreme Judicial Court, which held that the amendment did not prejudice the defendant. There was no denial of federal rights in this ruling.

The next assignment of error is that the trial judge erred in permitting the Commonwealth to defer sentencing of a co-defendant who had changed his plea from not guilty to

guilty on some counts of the indictment in the midst of the trial, and by further permitting the Commonwealth to call the said co-defendant as a state's witness immediately after the change of plea and much before the imposition of sentence, thereby prejudicially affecting the testimony of this witness by holding over his head the threat or reward of a sentence based on his degree of cooperation. There are numerous state and federal decisions holding that a co-defendant who has pleaded guilty is a competent witness even though he has not been sentenced. See *II Wigmore, Evidence,* sec. 580 (3rd ed. 1940). There was no denial of a federal right in allowing the co-defendant to testify.

Painten's next assignment of error is that "The Commonwealth of Massachusetts erred by removing one of the co-defendants from the local jail for the purposes of private interrogation conducted by the Commonwealth's prosecuting attorney after the time indictments had been presented by the grand jury." It is difficult to understand how this action could have infringed Painten's constitutional rights. The co-defendant who was removed from the jail pleaded guilty to the charge during the trial and turned state's evidence. Painten does not allege that the interrogation of the co-defendant was carried out in such a way that the co-defendant's constitutional rights were violated. He does not allege that the co-defendant was coerced or threatened in any manner during his interrogation. In fact, Painten alleges no facts whatsoever which could possibly give rise to any violation of his constitutional rights. He is not entitled to relief on this ground of his petition.

Petitioner's next assignment of error is that during the trial the questioning of one witness elicited testimony that Painten had been in prison. It also appears that during the instruction to the jury the judge referred to the fact

that Painten had been an inmate of the Massachusetts Correctional Institution. Petitioner argues that since Massachusetts law provides that a defendant's prior criminal record shall not be disclosed to the jury when the defendant does not testify, and since Painten did not take the stand at his trial, the admission of this testimony relating to his prior imprisonment was a denial of equal protection of the laws.

The transcript of the trial reveals that while Painten's counsel was cross-examining Bratkon, the co-defendant who had pleaded guilty, the following occurred:

> Q. Prior to that, when had you last seen him?
> A. Like I said, prior to that I seen him in jail.
> Q. I asked you when?
> A. Around '54. I imagine it was then.

A few moments later the following colloquy took place between the trial judge and the witness:

> The Court: When did you last see him before January '58?
> Witness: In jail, Your Honor.
> The Court: What?
> Witness: In jail.
> The Court: When was that?
> Witness: '54-'55—around there. I don't know exactly the time.

Counsel for Painten made no motion to strike this testimony at any point in the trial; nor did he ever request the trial judge to instruct the jury to disregard the testimony. See *Commonwealth* v. *Walter Edward Early,* Mass. Adv. Sheets (1965) 1303. Under these circumstances, it cannot be said that petitioner was denied equal protection of the laws.

Petitioner next contends that "the trial justice prejudiced petitioner's right to a fair trial by misleading the jury during his instructions to that body at the conclusion of the trial." Specifically, petitioner relies on (1) the trial judge's statement, "I think you will have (with you) Mr. Painten's record. I believe the records were introduced in evidence that he was twice convicted of rape. . . . "; and (2) what the petitioner characterizes as a completely erroneous recollection of a witness' answer by the trial judge in his instruction.

The transcript of the trial reveals that at the conclusion of the charge the erroneous reference to Painten as the man who had been convicted of rape was called to the judge's attention during a conference at the bench. The trial judge then instructed the jury that the records referred to were Bratkon's conviction of the rape of two persons and were offered to impeach his credibility. This corrective charge removed any prejudice which may have resulted to Painten from the jury charge.

As to the contention that the judge stated an erroneous recollection of a witness' testimony in his charge to the jury, it should be noted that the judge had charged the jury that it was their recollection of the evidence that should govern their deliberations, not that of the judge. Furthermore, there was no objection to the portion of the charge which petitioner now claims was erroneous.

This was a long trial, involving four defendants and a number of charges. The trial lasted twelve days. The judge can hardly be expected to have remembered every detail of the evidence. Upon a fair reading of the entire charge it cannot be said that the trial judge so misled the jury as to deprive petitioner of due process of law.

Petitioner's next assignment of error is that articles which had been seized during an illegal search of his apart-

ment were admitted into evidence against him. Before resolving Painten's contentions with regard to illegal search and seizure, the contention of the Commonwealth that Painten is not in a position to obtain the benefits of the doctrine of *Mapp* v. *Ohio,* 367 U.S. 643 (1961) must be considered. The Supreme Court held in *Linkletter* v. *Walker,* 381 U.S. 618 (1965) that the exclusionary rule of *Mapp* did not apply retroactively to convictions which had become final by the date of its decision in *Mapp* (June 19, 1961). The record proves that Painten's conviction was affirmed by the Supreme Judicial Court of the Commonwealth of Massachusetts on June 9, 1961. Since the time within which Painten could petition for a writ of certiorari had not expired when Mapp was handed down, his conviction was not final as that term is defined in *Linkletter* v. *Walker, supra,* [at 622 n. 5]* and, therefore, evidence obtained through an illegal search and seizure was not admissible in Painten's trial in state court, even though the trial occurred in 1958.

As a corollary it follows that at the time of the trial in Superior Court, *Wolf* v. *Colorado,* 338 U.S. 25 (1949) was still believed by the bar to be good law. For this reason no waiver of Painten's rights under *Mapp* may properly be inferred from the failure of the record to establish an objection by his counsel on the grounds of the illegal search to the admission of the articles about whose admission he now complains. *U.S. ex rel Angelet* v. *Fay,* 333 F.2d 12 (2d Cir. 1964), aff'd. on other grounds, *Angelet* v. *Fay,* 381 U.S. 654 (1965); *United States* v. *LaVallee,* 334 F.2d 331 (2d Cir. 1964); *Dillon* v. *Peters,* 341 F. 2d 337 (10th Cir. 1965). It follows that Painten's claim of a violation of his constitutional rights by the illegal search and seizure must be decided on the merits.

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* See Order, *infra,* p. 59.

On the basis of the state court record and the evidentiary-type hearing held in this Court, I find that on Saturday night, March 1, 1958, Emmett McNamara and Herbert Maxwell, two plainclothes officers of the Boston Police Department, were on patrol in an unmarked police car. About 8:30 p.m., they were traveling along Dartmouth Street behind a Ford sedan occupied by two men in soft, black hats. At the intersection of Dartmouth Street and Columbus Avenue, the sedan crossed Columbus Avenue and pulled up in front of a liquor store while the police car stopped at the traffic light. Since there had recently been a rash of liquor store holdups, Officer McNamara kept an eye on the sedan and saw petitioner Painten get out of the car and enter the store. McNamara confirmed his identification from a "mug" shot of Painten which he had in his pocket. The sedan moved slowly up the street, turned around, and was returning as McNamara, his suspicions aroused by the car's movement, crossed the intersection and pulled up before the liquor store. When the driver of the sedan saw Officer McNamara in the unmarked police car he took off down the street with a burst of speed. McNamara wheeled the squad car around and gave chase, using his siren.

After chasing the sedan for several blocks McNamara overtook and stopped it. As he approached the car he recognized the driver, George Ash, whom he knew had been convicted of holdups in the past and had served time in prison. McNamara ordered Ash out of the car and asked him why he had run. Ash said McNamara had "scared" him. McNamara could see that Ash was not carrying a weapon. He looked in the car and after some conversation let Ash go on his way, in the hope that Ash would lead him to Painten. Ash returned in the direction of the liquor store.

McNamara returned to the liquor store and showed Painten's picture to the clerk, who told him that Painten lived in a nearby apartment building. He then drove to the address given by the clerk and in a parking lot behind the apartment building found the car that Ash had been driving. A check of the front door disclosed Painten's name under one of the doorbells. Knowing Painten and Ash, and the reputation of this apartment building, McNamara returned to his car and put in a radio call for two more police officers.

McNamara was interested in Painten and Ash because he considered them likely suspects for a loan company robbery that had taken place earlier on the same day. McNamara had no information connecting them with the loan company holdup or, for that matter, with any other crime; he had not set out on patrol with Painten or Ash particularly in mind as suspects; on the contrary, his suspicions focused on them only when they crossed his path. McNamara felt that Ash was a likely suspect for the loan company holdup because he had been convicted of holdups in the past and that Painten was a likely suspect because he had a record, though McNamara did not know what it was. McNamara had seen Painten in the company of men that he knew from police work. The only description of the holdup men which McNamara had available was that they were "two white men, one tall, one a little shorter." As Officer McNamara candidly admitted, there were "plenty of other fellows around the South End that could possibly have gone into the same category" as Painten and Ash if they had come across his path.

When Officers Megnia and Rufo arrived at the apartment building in response to his call, McNamara told them he and Maxwell were "going up to see some fellows up in an apartment, if we can find them," and sent Rufo to watch

the rear of the building. McNamara, Maxwell and Megnia then approached the apartment building, found the outer door unlocked, and entered. Leaving Megnia to guard the stairway, McNamara and Maxwell went to Painten's third floor apartment and knocked on the door. Painten answered the door, opening it only a few inches, and asked "Who's there?" McNamara showed his badge and replied, "It's the Boston Police. We'd like to talk to you." Painten asked if they would wait a minute, McNamara replied that they would, and Painten closed the door. While the door was closed McNamara heard what sounded like a window being raised and lowered inside the apartment. A few seconds later Painten opened the door. McNamara and Maxwell entered the apartment.

Inside, in the kitchen, they found George Ash and a woman identified as Doris Painten. Painten stated that the apartment was his. Noticing a bulge in Ash's pocket McNamara stuck his hand into it and found about $200.00 in ten and twenty dollar bills stuffed in the pocket. There was some conversation between McNamara and the occupants of the apartment. No search of Painten's person or his apartment took place at this time.

In the meantime, from his vantage point behind the building, Officer Rufo had seen someone open a window in Painten's apartment and drop a bag onto the fire escape. The two kitchen windows of Painten's apartment faced the back of the building. On the third floor level, the fire escape extended to a point on the wall about midway between these two windows. On the second floor level, however, the fire escape extended to the edge of the building, so that it was directly under the corner window of Painten's kitchen, the window from which the bag was dropped. The bag fell to the second story fire escape and landed with a metallic clang. As soon as the window was closed,

Officer Rufo went around to the front of the building, entered, went up to Painten's apartment, into the kitchen, and told McNamara "They threw a bag out the window." About three minutes had passed since McNamara's entry into Painten's apartment.

While McNamara, Maxwell and Megnia kept an eye on Painten and Ash, Rufo raised the venetian blind, opened the window, stepped out onto the fire escape, went down the ladder to the second floor level, picked up the brown paper bag and started to rip it open. He saw the muzzle of a .45 and immediately returned to Painten's apartment. In the kitchen McNamara opened the bag and discovered, wrapped in three sheets of waxed paper, a .32 caliber automatic and a .45 caliber revolver, together with nine .32 caliber bullets and thirteen .45 caliber bullets scattered about the bag. He asked whether anyone knew anything about the pistols and Painten responded that he knew nothing about them. McNamara then placed Painten under arrest "for suspicion of a holdup on a loan company," and proceeded to make a thorough search of the apartment.

During the search, McNamara discovered and seized a box of .32 caliber shells found on a kitchen shelf and about $980.00 found under the mattress in Painten's bedroom. Painten was still in the apartment when these articles were seized. After the arrest more police were called in and Painten and the others were taken to Station 4. Some time after Painten had been taken to the station, exactly how long does not appear in the record, except that it was later in the same evening, the police found and seized a roll of waxed paper. The roll of waxed paper, the sheets of waxed paper, the paper bag, the guns, the ammunition, and the money were all taken to the station. Over the weekend, FBI agents made a list of the serial numbers of the money found under Painten's mattress.

At Painten's trial in state court, all these items except the money were introduced into evidence. There was testimony that the bag with the guns and ammunition had been thrown from Painten's apartment and recovered from the fire escape. There was testimony that the roll of waxed paper came from Painten's apartment and that the sheets of waxed paper in which the guns had been wrapped were torn from this roll. There was testimony that the box of .32 caliber bullets was found in Painten's apartment. The serial numbers of some of the money taken from Painten's apartment were read into evidence and there was testimony that these serial numbers matched those of bills that had been taken in the robbery of the Peoples National Bank. There was testimony that the serial numbers had been taken from money found in Painten's apartment.

I rule, on the basis of this record, that Officer McNamara did not have probable cause to arrest Painten when he went to Painten's apartment and sought entrance thereto. All that he knew when he knocked on Painten's door was that Painten had some sort of a record and that he had seen Painten in a car with Ash who he knew had a record for holdups. I find that the officers went to the apartment intending to ask Painten a few questions and then to arrest him "on suspicion of the loan company job." In so finding I have in mind the statement by Officer McNamara at the hearing here that if Painten had not gone from the car into the liquor store he would have asked him and Ash a few questions and then "I believe I would have taken them to Station 4 on suspicion of that holdup that day." I likewise have in mind that the calling of additional officers by radio and the placing of officers to guard both front and rear exits of the apartment building is far more indicative of a planned arrest than of an intended interview.

It follows that the entrance into Painten's apartment without a warrant and absent any probable cause to arrest

any occupant thereof was "under color of their police authority" (*Johnson* v. *United States*, 333 U.S. 10, 16 (1948)) and there was no "valid basis in law for the intrusion." Id., p. 17.

Since the officers had no probable cause to arrest when they entered the apartment they cannot retroactively validate the entry or arrest by reliance on what they discovered as a result of the illegal entry. *Johnson* v. *United States*, *supra*, at p. 16. "'A search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from' what is dug up subsequently." *Ker* v. *California*, 374 U.S. 23, at 41 n.[12],* quoting *United States* v. *DiRe*, 332 U.S. 581, 595 (1948).

I rule that the guns, bullets, sheets of waxed paper, roll of waxed paper, paper bag, and the serial numbers of the bills obtained during the course of the search were all obtained in violation of Painten's constitutional rights and that their use as evidence at his trial was a denial of his constitutional rights.

In view of this disposition of the allegation of illegal search I do not reach Painten's contentions with regard to the "cage" located in the Middlesex Superior Court courtroom. In any event, these contentions will be moot on retrial since the cage has been removed from the Middlesex Superior Court courtroom.

The petition for writ of habeaus corpus is allowed and the Commonwealth of Massachusetts is directed to either bring Painten to a new trial on these charges within sixty days from the filing of this opinion or to discharge him from custody.

ANDREW A. CAFFREY
U.S. District Judge

* See Order, *infra*, p. 59.

Opinion of the United States Court of Appeals for the First Circuit.

No. 6720.

COMMONWEALTH OF MASSACHUSETTS
RESPONDENT, APPELLANT,
v.
DONALD M. PAINTEN,
PETITIONER, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[252 F.Supp. 851]

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Willie J. Davis, Assistant Attorney General, with whom Edward W. Brooke, Attorney General, was on brief, for appellant.
Louis M. Nordlinger for appellee.

OPINION OF THE COURT.

November 10, 1966.

ALDRICH, *Chief Judge*. Petitioner was convicted in the state court of armed robbery and various connected offenses, and was given extensive sentences. His conviction was affirmed *sub nom. Commonwealth* v. *Binkiewicz*, 1961, 342 Mass. 740. Thereafter he sought a writ of error in the state court, raising, for the first time, the matters now before us. The writ was dismissed. Having thus exhausted his state remedies, he filed a petition for habeas corpus in the district court. The writ was granted, *Painten* v. *Commonwealth*, D. Mass., 1966, 252 F.Supp. 851, and the Commonwealth appeals.

It is necessary for us to consider only one of petitioner's contentions. In upholding the writ on this ground we rely upon the findings of the district court, which appear at 252 F.Supp. 855-56, except for the recitation of a conversation, more precisely set out hereafter, that took place when the police knocked at the petitioner's door. Very briefly, two policemen, knowing of a holdup but having no substantial clues, came across petitioner and one Ash, and followed them to petitioner's apartment. Their grounds for suspicion did not, even remotely, amount to probable cause for arresting either Ash or petitioner, either for the holdup or for any other crime. After arranging for plainclothesmen to station themselves at the back of the building, one of the uniformed officers then knocked on the door. He testified as follows:

> "I rapped on the door, and a voice said, 'Who is it?' I said, 'Police officers.' The door opened about three inches, and Mr. Painten looked out at me. He saw us. I had my badge in my hand. He said, 'Will you wait a minute?' I said, 'Sure.' He closed the door. As he closed the door, maybe ten seconds later I heard what to me sounded like a window opening and closing. He then, a few seconds after the door was opened, we were allowed to enter. . . . I asked who lived there. Painten volunteered it was his apartment."

After entering the apartment, the police noticed a bulge in Ash's pocket, and removed some $200 in crumpled bills. They then called to the plainclothesmen to come up, and received the response that "someone" had thrown "something" out the window. This information led to the discovery on the fire escape on a floor below of a paper bag containing two pistols and some cartridges. Peti-

tioner was thereupon arrested; the apartment was searched, and a large amount of currency was found under a mattress. At petitioner's trial the guns and bills were introduced in evidence.

Although these events took place in 1958 it is conceded that petitioner is in a position to obtain the benefits of the doctrine of *Mapp* v. *Ohio,* 1961, 367 U.S. 643.

This case falls over the permissible line that we recently sought to delineate in *Robbins* v. *MacKenzie,* 1966, 364 F.2d 45, *cert. den.* 10/17/66. In that case the district court found, on adequate evidence, that no search was intended. We held that where the police, having reasonable suspicion but not probable cause, knocked on a door and asked to talk, and had no other purpose, they were entitled to treat an invitation to enter as voluntary consent. Our discussion need not be repeated, but we distinguished cases where the purpose of the police was not merely to talk, but to make a search.

In the case at bar the police sought entry without stating their purpose. If this was a request to make a search, acquiescence when police knock and exhibit a badge is not true consent to a search, as the cases cited in Judge Coffin's dissenting opinion in *MacKenzie* make clear. The Commonwealth's own evidence indicates that a search was in fact intended. In addition, the district court found that the police purpose was to arrest petitioner, although they had no warrant or ground for obtaining one. The Commonwealth disputes this appraisal of the testimony, and the correctness of the court's finding as to purpose, but its own police officer, with commendable candor, testified as follows:

> "Q. Was it your opinion . . . something was going on in that household to give you reason to enter the household without a warrant?" A. "Yes, sir . . .

> in that household, it has people with a background, people that I knew were in there, I might be able to solve a string of serious crimes."

This suggests to us a proposed investigation surpassing mere dialogue. When asked a second time his reason for seeking to enter, the officer testified,

> ". . . . now we have them [Ash and petitioner] together in the apartment and the holdup of the loan company is in my mind now . . . and I find out he is living there, these things in my mind lead me to arrest him for that holdup."

It is apparent that the police, knowing of a crime and knowing that Ash and petitioner were suspicious characters, but having no reason to connect them with the crime they were investigating, set out to arrest and search the men in the hope that evidence would develop. It is precisely such tactics that the Fourth Amendment makes unlawful.

It follows that, as the court said in *Hobson* v. *United States,* 8 Cir., 1955, 226 F.2d 890, at 894, "The defendant's action in throwing the package was not voluntary but was forced by the actions of the police," and since their actions were improper, the police were not entitled to the fruits. The state could not use the guns, even as probable cause; if they were such, to justify their subsequent conduct in making an arrest, or the search in which they discovered the money. *Wong Sun* v. *United States,* 1963, 371 U.S. 471, 482-84.

Affirmed.

COFFIN, *Circuit Judge* (concurring). While I concur with my brothers in the result reached by them, I differ as to the path taken to reach it. I would link the inadmis-

sibility of the guns and bullets not to the officers' request for entry, whether lawful or not, but rather to the later, unauthorized exercise of dominion over petitioner's apartment when an officer used it as a conduit of convenience for seizing the bag on the fire escape. That the officers could have obtained the bag without invading petitioner's premises does not cure the defect. The mere fact that officers had previously gained access to the apartment, even if lawfully, and were conversing in it with petitioner did not, in my view, provide another officer with license to use it as a thoroughfare.

Without the guns and bullets contained in the bag, there was no probable cause for any arrest or subsequent search.

What troubles me about the opinion of my brothers is their reasoning that, since the officers harbored an improper purpose, their knocking on the door and identifying themselves was also "improper" and immunized from use any objects jettisoned into public view and beyond petitioner's premises. I would not go so far as to say that such preliminaries could shield evidence later discovered if it were obtained without going on the premises of a suspect. Such a holding, it seems to me, would open the door unnecessarily to claims of immunity buttressed on routine and proper investigatory actions of police. Even if the request to enter in this case was improper, it by no means follows that that conduct alone was so shocking as to taint evidence virtually handed to the officers on a silver platter or, in this case, on an iron grating.